No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANDRE RALPH HAYMOND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF SOCIAL SCIENCE AND LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Daniel E. Gustafson
Counsel of Record
Karla M. Gluek
Eric S. Taubel
Gustafson Gluek PLLC
120 South Sixth Street
Suite 2600
Minneapolis, MN 55402
(612) 333-8844
dgustafson@gustafsongluek.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICI CURIAE

Amici are eighteen scholars across six disciplines whose work includes the leading empirical studies of persons convicted of sexual offenses and the laws applied to them. The Appendix identifies them and describes their work.

Amici believe it critical that judicial decisions affecting constitutional rights be grounded on an accurate understanding of empirical realities. At the very least, they should not propagate misunderstandings. Unfortunately, such misunderstandings about the re-offense risk posed by people who have been convicted of sexual offenses are not only commonplace, but often traceable to language in early opinions of this Court. The Government invites the Court to repeat that language. But the Court's mistaken statements have been consequential. Amici wish to provide the Court with accurate descriptions of the scientific studies addressing these subjects so that it may correct rather than repeat the misunderstandings expressed in earlier opinions.[1]

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[1] No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

Mr. Haymond was an 18-year-old community college student when an FBI undercover agent using a computer file sharing program accessed seven sexually explicit images of pubescent boys on his computer.[2] *United States v. Haymond*, 672 F.3d 948, 950-51 (10th Cir. 2012). Mr. Haymond was convicted of one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). *United States v. Haymond*, 869 F.3d 1153, 1156 (10th Cir. 2017). The district court sentenced him to thirty-eight months in prison and a ten-year term of supervised release, which began in April of 2013. *Id.* at 1156. A Probation Officer search of his Android phone in October of 2015 led to the district court's finding that "it was more likely than not" that he knowingly possessed thirteen images of child pornography, in violation of his supervised release conditions. *Id.* at 1156-57. The court observed that the government's evidence was insufficient to show knowing possession beyond a reasonable doubt. *See* Petitioner's Appendix (Pet. App.) at 68a. The Tenth Circuit observed it was "a close case" even under the preponderance standard applied to supervised release violations. *Haymond,* 869 F.3d at 1159.

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[2] The government's experts testified the boys in question were between 12 and 14 years old. *Haymond*, 672 F.3d at 953.

Section 3583(e)(3),[3] which usually governs revocation of supervised release, allows the court to return a violator to prison if it finds by a preponderance of the evidence that he "violated a condition of supervised release." But it does not *require* the court to return the violator to prison for any particular period, or at all. It does set the maximum term the court may impose by reference to the seriousness of the original crime of conviction, not the seriousness of the violation: the longer the maximum term of imprisonment permitted for the original crime of conviction, the longer is the maximum term of re-imprisonment that may be imposed for the supervised release violation.[4] Thus the "gravity of the initial offense determines the maximum term of re-imprisonment," which supplies the "link" between "the second prison sentence [and] the initial offense." *Johnson v. United States*, 529 U.S. 694, 708 (2000). That link is required to avoid "the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Id.* at 700. Among the serious constitutional problems that would arise, if reimprisonment were imposed for the violation, is that "the violative conduct . . . need only be found by a judge

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[3] All statutory references are to Title 18 of the U.S. Code, unless otherwise specified.

[4] Under § 3583(e)(3), the maximum term of re-imprisonment depends on the "class" of the felony. A felony is ordinarily graded in Classes A through E based on the severity of the maximum term of imprisonment that may be imposed for it, § 3559(a).

under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.*

That constitutionally essential link is broken, however, for the sexual offenses listed in § 3583(k). Non-production child pornography offenses, referenced here as possession[5], account for most of the prosecutions brought for all the listed offenses combined. The maximum term of imprisonment for Mr. Haymond's possession offense, §§ 2252(a)(4)(B) and (b)(2), is ten years. It is therefore a Class C felony (§ 3559(a)(3)), with a two-year maximum sentence for any violation of supervised release conditions under the usual rule of § 3583(e)(3), and no minimum. But because he was accused of violating his supervised release condition with a second possession offense, under § 3583(k) he was subject to a *minimum* prison term of five years, with a maximum of *life*. In the Government's view, this new sentence is additional punishment for his original crime of conviction, which

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[5] Possession, receipt, and distribution of child pornography are usually grouped together as non-production offenses, because for most defendants they do not describe different conduct. For this reason, we often refer to the entire group of non-production offenses as "possession". Possession generally requires receipt, and possession defendants generally obtain images through file sharing programs, which makes them potentially guilty of distribution. Although possession is the most common charge brought against non-production offenders, 97.5% of them could have been charged with receipt or distribution. U.S. Sentencing Comm'n, 2012 Report to the Congress: Federal Child Pornography Offenses (hereinafter, "Sentencing Commission Report"), 127, 146-17 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

means it would not foreclose a separate prosecution for the second offense itself.

This extraordinarily harsh provision sets a sentencing range for Mr. Haymond's supervision violation that is entirely disproportionate to the sentencing range for his crime of conviction, which has no minimum sentence, and a maximum of ten years. Even a second conviction for possession of child pornography carries a maximum sentence of twenty years, not life (§ 2252(b)(2). The sentencing judge in Mr. Haymond's case stated that he would have sentenced him to two years or less were he not bound by the five-year mandatory minimum. *Haymond*, 869 F.3d at 1162.

Because § 3583(k) provides for a sentencing range for the supervised release violation that is entirely unbound by the sentencing range for the crime of conviction, it cannot possibly be understood as part of the sentence for it. To the contrary, the section's much harsher sentencing range is triggered by the court's conclusion that the offender committed one of the particular offenses the section specifies for such treatment. It could not be clearer that § 3583(k) imposes punishment for that second sexual offense, not for the first. Thus, the provision necessarily raises–and fails–the "serious constitutional questions" the Court was able to avoid in *Johnson*.

No similar regime would apply to a bank robber convicted under 18 U.S.C. § 2113, who repeats that crime while on supervised release. He would face neither the possibility of a life sentence for his supervised release violation, nor a mandatory minimum five-year term. His violation, governed by the

normal rule, would carry a maximum term of two years, under § 3583(e)(3), as it is not punishment for the second robbery but the delayed imposition of punishment for the first, as conceived by *Johnson*.[6] Of course, he could be prosecuted for the second robbery, and if convicted be subject to any sentencing provisions triggered by this re-offense history. But if the factfinder was not persuaded of his guilt beyond a reasonable doubt, he could not be punished for the second offense in addition to the first. The question this case presents is whether the Constitution permits sexual offenders to be treated differently, by subjecting them to punishment for the second offense without the same Fifth and Sixth Amendment protections.

The difference in their treatment is exacerbated by other supervised release rules that only apply to sexual offenders. Supervised release is not required for most federal offenders, and in any event is usually limited to five years. § 3583(b). In contrast, those convicted of sexual offenses must receive a *minimum* supervised release term of five years and may be sentenced to lifetime supervised release. § 3583(k). About one-third of those convicted of possession are in fact sentenced to lifetime supervised release.[7] As a result, they remain

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[6] The maximum term of imprisonment for bank robbery under 18 U.S.C. § 2113(a) is twenty years, which makes it a Class C felony, § 3559(a)(3), which in turn sets the maximum sentence for a violation of supervised release as two years, § 3583(e)(3).

[7] Sentencing Commission Report, *supra* n. 5, at 276, showing that 30% of those convicted under the possession section receive lifetime supervision, as do 42% of those convicted under the distribution and receipt sections that effectively reach the same conduct.

in jeopardy their entire lives to a sentence of life in prison imposed by a judge, acting without a jury, who need not be persuaded beyond reasonable doubt of the new offense for which the sentence would be imposed.

The Government suggests that Mr. Haymond's Fifth and Sixth Amendment rights may be compromised because of a Congressional judgment that most "sex offenders" suffer from "deep-seated aberrant sexual disorders", which cause "frightening and high" re-offense rates. *See* Petitioner's Brief ("Pet. Br.") 6, 54 (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)). Even were these factual claims true, they could not possibly explain why any individual could be punished for having committed a second offense without the right to require the government to prove, beyond a reasonable doubt, that he in fact had committed it. The Government's argument is simply a logical non-sequitur. But it is nonetheless cause for concern.

As explained below, nearly two decades ago in *McKune v. Lyle* and *Smith v. Doe*, the Court took "facts" from an amicus brief filed by the Solicitor General that were not in the record, had never been subject to an adversarial hearing, and never published in any peer-reviewed scientific journal, to defend from Constitutional attack other provisions also targeting sexual offenders. In the succeeding decades both courts and legislators have often accorded these "facts" essentially binding effect, because this Court had stated them. *See, e.g., Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018), *cert. denied January 7, 2019*, (quoting *Smith* to explain why the high risk posed by sexual offenders is "self-evident"). The Government's

brief in this case, yet another example, is essentially self-referencing.

The phenomenon is troubling because, as we explain below, the broad scientific consensus is that these often repeated "facts" are seriously mistaken and would not survive adversarial testing. *See Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"), *cert. denied*, 138 S. Ct. 55 (2017). The Court should use this case as an occasion to discourage litigants from advancing these and other unsupported, extra-record claims, and in particular, to make clear that the discredited factual assertions that the Government cites enjoy no special status because they once made their way into the U.S. reports. Whatever else the Court says or does in this case, we urge that it not give the Government's offhand empirical assertions any credence. It should instead discourage such arguments.

ARGUMENT

I. Overview of Supervised Release Rules Generally, and for Sexual Offenses

A term of supervised release ("supervision") may be included, at the court's discretion, with any sentence of imprisonment. § 3583(a). In exercising that discretion, the court is directed to consider several factors, including special deterrence and the need to provide the defendant with needed training or medical care. § 3583(c). Punishment, a factor courts consider in

setting terms of imprisonment, is omitted from the statutory factors relevant to supervision.[8]

A court that finds that the defendant violated a supervision condition may revoke it and "require the defendant to serve in prison all or part of the term of supervised release authorized by statute" for the original offense (without credit for time already served under post-release supervision). § 3583(e)(3). As explained above, the maximum term of such reimprisonment ordinarily varies from one to five years, according to the severity of the crime for which the defendant has been convicted. § 3583(b). But sexual offenders are generally excepted from this framework because of two separate statutory enactments – the PROTECT Act of 2003[9] and the Adam Walsh Act of 2006[10]–whose provisions relevant to the issue here are codified at § 3583(k).

The first sentence of § 3583(k) establishes, for a wide range of sexual offenses, a minimum supervision term of five years, and a maximum of life, rather than the minimum of zero and maximum of one to five years that applies to other federal felonies. The sexual offenses covered by this sentence include serious Class A and B felonies, such as sex trafficking of children (§ 1591), as well as Class C felonies such as possession of child pornography (§§ 2252 and 2252A).

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[8] The § 3553(a)(2)(A) factor, "just punishment for the offence" is omitted from those otherwise cross-referenced by § 3583(c).

[9] 117 Stat. 650, P.L. 108-21 (2003).

[10] 120 Stat. 590, P.L. 109-248 (2006).

The second sentence of § 3583(k) applies to anyone required to register under SORNA, the Sex Offender Registration and Notification Act (34 U.S.C. § 20911 *et seq.*). This list overlaps but is not identical with the offenses covered by the first sentence.[11] By virtue of the first sentence of § 3583(k), most of these individuals are subject to longer terms of supervised release than other federal offenders. By virtue of the second sentence of § 3583(k), they are subject to enhanced penalties for violations of supervised release whenever the conduct constituting the violation constitutes an offense that is on yet a third list, also set out in this sentence, which again overlaps, but is not identical to, either of the first two.

SORNA registrants covered by the second sentence who commit an offense on this third list, while under supervision, thereby commit a supervision violation subject to a different sentencing range than that which § 3583(b) sets for most other federal offenders. The sentencing range under § 3583(k) for a supervision violation is imprisonment for a term of five years to

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[11] SORNA also applies to state offenders who fail to register after traveling interstate, § 2250(a), so the group "required to register" could be larger than the group identified in the first sentence, who are only federal offenders. But it is unclear whether the second sentence is meant to apply to such state offenders. That sentence addresses the revocation of federal supervised release, and the context suggests they must be on federal supervised release for a federal sexual offense. We make no attempt here to provide a comprehensive parsing of the statute's unnecessarily complex description of the offenders to whom it applies. Suffice to say that Mr. Haymond and others like him are covered by the second sentence.

life, not the zero to five-year range that is otherwise applied.[12]

As the Tenth Circuit correctly recognized, this scheme inevitably produces serious sentencing anomalies that violate *Johnson's* requirement that post-revocation penalties must be "part of the penalty for the initial offense," 529 U.S. 694, 700 (2000), rather than "punishment for defendants' new offenses for violating the conditions of their supervised release." *Id.* Its application to Mr. Haymond's possession offense is an excellent example. The statutory sentencing range for a possession offense is zero to ten years. § 2252(b)(4). But under § 3583(k), he must serve an additional term of at least five years, even if he had already served the ten-year maximum, and is put in jeopardy of a life sentence for the violation, despite the ten-year maximum for the offense. Even a second possession offense carries maximum sentence of twenty years. § 2252(b)(2). We agree with the Tenth Circuit that § 3583(k) "effectively transforms the revocation proceeding into a criminal prosecution, imposing punishment for new conduct." *Haymond*, 869 F.3d at 1166. In fact, it effectively creates an alternate route

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[12] The last sentence of § 3583(k) sets their minimum term for the violation at five years. The maximum term is life because, for any registrant who is on supervised release for a crime that is on the first list in § 3583(k), the first sentence of the section establishes a maximum supervised release term of life, and under § 3583(e)(3), the maximum term of imprisonment for a violation equals the maximum term of supervised release that could have been imposed for that offense. Although§ 3583(e)(3) ordinarily caps that maximum (by reference to the seriousness of the crime of conviction, as explained above), § 3583(k) removes those caps for these violations.

for criminal prosecution for a second offense that eliminates the right to a jury and the requirement of proof beyond a reasonable doubt, while authorizing a far harsher sentencing range.

The Government explains § 3583(k) as grounded on a Congressional "judgment that a particular minimum term of re-imprisonment is necessary for a sex offender like respondent who commits a further sex offense while on supervised release." *See* Pet. Br. 51. That explanation, of course, assumes Respondent has re-offended while on supervised release, when the issue in this case is the evidentiary standard by which to judge the claim that he has. The Congressional power to set a minimum sentence of five years upon a second conviction for possession is not in dispute. The question instead is whether that sentence can be imposed even if the government is unable to prove the second offense beyond a reasonable doubt.

The Government argues that the special rules set out in § 3583(k) are needed because the offenders to whom they apply have "deep-seated aberrant sexual disorders" that result in high re-offense rates.[13] *See* Pet. Brief at 6. We examine the history and accuracy of these factual assertions below. But even if they were true, it is not clear why they would be relevant to the issue in this case. No one would suggest, for example, that because men in their 20's are more likely to re-offend than are older men, the state should be able to

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[13] The Government cites H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 49-50 (2003) for the claim that most sexual offenders have "deep-seated aberrant sexual disorders." While the report makes this assertion, it offers no basis for it.

establish a 22-year old's second offense by a preponderance of the evidence, deny him the right to a jury, and subject him to an enhanced sentencing range, even if none of these provisions would meet Constitutional requirements if he were over forty. This case is no different.

The companion claims that "sex offenders" re-offend at high rates, and that most have deep-seated psychological defects, may reinforce one another in the lay mind. Psychological defects plausibly explain high re-offense rates, and high rates seem to confirm the offenders' defects. Each claim thus feeds the common public intuition that the other is true. These claims also enlist the emotions. People with deep-seated aberrant sexual disorders that compel criminal behavior are indeed frightening, and that fear demands we do something about – or to – such people.

Whether such fears could justify compromising Fifth and Sixth Amendment rights is hardly clear, but surely *baseless* fears cannot. Factual assertions offered to justify the compromising of constitutional liberties require more than casual observation to support them. Unfortunately, as we explain in the next section, the Court has not always required more, with the unfortunate result that its own earlier statements are offered back to it, and other courts, as authority for empirical propositions inconsistent with the scientific evidence.

II. *Smith v. Doe*'s Influential But Misleading Description of Sexual Offender Re-Offense Rates as "Frightening and High" Was Based on a Flawed Reference. The Court Should Decline the Government's Invitation to Repeat It.

Smith v. Doe's dramatic description of the "frightening and high" re-offense rates of registrants, relied upon by the Government, *see* Pet. Br. 54, was first employed in the plurality opinion in *McKune v. Lile*, 536 U.S. 24, 34 (2002), before the Court repeated it in *Smith*, 538 U.S. 84, 103 (2003). It soon went viral. By 2015, the phrase "frightening and high" was found in 91 judicial opinions, and briefs in 101 cases, and more recent searches increase the count.[14] Two examples illustrate the impact of the phrase on the law.

The Iowa Supreme Court, while expressing sympathy for the "difficulties" that state's residency restrictions created for the "offender and his family, who lack financial resources," rejected his constitutional challenge to them because "the risk of recidivism posed by sex offenders is 'frightening and high'", as "numerous authorities have acknowledged." *State v. Seering*, 701 N.W.2d 655, 664-65 (Iowa 2005). Despite this reference to "numerous authorities," only *Smith* was cited. A 25-year old Kansas man convicted of consensual intercourse with a fifteen-year old girl

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[14] Ira Ellman & Tara Ellman, "Frightening and High": *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497 (2015). A Lexis search on October 4, 2018 found 119 cases with the phrase "frightening and high."

challenged the state's application to him of a law mandating lifetime post-release supervision of all sexual offenders. The Corrections Department psychologist had testified he accepted responsibility for his actions, displayed an "appropriate level of remorse," and was at low risk to re-offend. *State v. Mossman*, 281 P.3d 153, 157, 161 (Kan. 2012). Rejecting the challenge, the Kansas Supreme Court cited *Smith* in explaining that the legislature could reasonably have concerns about the "frightening and high" re-offense rates of "convicted sex offenders." *Id.* at 160.

The statement in *McKune* that *Smith* referenced said that "the recidivism rate of untreated offenders has been estimated to be as high as 80%". *Smith*, 538 U.S. at 103 (citing *McKune*, 536 U.S. at 33). This claim in *McKune* was supported with a citation to a Justice Department "manual",[15] likely brought to the Court's attention by the Solicitor General's amicus brief in *McKune*, which cites the same manual for the same proposition. *See* Brief for the United States as Amicus Curiae at 3 n.2, *McKune v. Lile*, 536 U.S. 24 (2002). The manual, a collection of chapters by diverse authors, did not present the views of the Justice Department. The chapter containing the quoted claim, cited only one source for it - an article in the mass-market magazine *Psychology Today* that itself contained no reference to any data of any kind.[16] The

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[15] U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988), *available* at https://www.ncjrs.gov/pdffiles1/Digitization/123683NCJRS.pdf

[16] See Ellman & Ellman, *supra* n. 4 at 497-98 (2015), which uncovered this story.

article described the author's prison counseling program for sexual offenders, and the statement was offered to contrast the re-offense rate of untreated offenders with an equally unsupported claim about the lower rate for those who completed the author's program. The author has since disavowed the statement.[17]

Peer-reviewed studies published since *Smith* have demonstrate its error. See *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in Smith that the 'risk of recidivism posed by sex offenders is 'frightening and high.'"), *cert. denied*, 138 S. Ct. 55 (2017) (internal quotation marks omitted). But it still lives on, e.g., *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018) (quoting *Smith* to explain why the high risk posed by sexual offenders is "self-evident").

It is worthwhile to reflect on why the error came about. It would obviously have been avoided by more careful attention to the cited authorities. But a casual approach to testing a statement's accuracy is more likely when the statement is consistent with one's intuitions. And for most people, the very label "sex offender" communicates a dangerous individual with uncontrolled compulsions who is likely to do harm.

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[17] Jacob Sullum, *"I'm Appalled," Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, REASON (Sep. 14, 2017), http://reason.com/blog/2017/09/14/im-appalled-says-source-of-pseudo-statis.

But "sex offender" is a legal classification, not a psychological diagnosis. It includes some who have committed multiple violent attacks, but also others (like Mr. Haymond) who have only a single conviction for an offense that involved *no* contact of *any* kind, physical or communicative, with *any* victim. The assumption that such diverse offenders share common psychological traits and similar re-offense risks is implausible. In this case, as we document below, the intuition is correct. Many included within the "sex offender" label are among the least likely of all felons to re-offend.

A label that recharacterizes a single event in an individual's history into a dangerous personal attribute confuses discussion. We therefore avoid its use in the remainder of this brief and refer instead to those to whom the rules at issue here apply as "registrants."[18]

III. The Failure to Account for the Enormous Differences Among Registrants Explains Much of the Court's Historically Mistaken Understanding of Re-Offense Rates.

The Court's discussions of registrant re-offense rates often misinterpret studies by failing to focus on *whose* re-offense rates the study measures. *Smith* itself provides an example. In upholding the registration requirement at issue in *Smith*, the Court also referenced a professional study:

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[18] The term "registrant" refers to the main thing these individuals do have in common, which is the legal obligation to register under SORNA and related state laws.

> The duration of the reporting requirement is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur 'as late as 20 years following release." R. PRENTKY, R. KNIGHT, & A. LEE, U.S. DEPT. OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 14 (1997)).

538 U.S. at 104.

This paragraph quotes a summary of the Prentky study's findings. The full account, published the same year in a peer-reviewed professional journal,[19] explains that the "child molester" population the study followed was 115 individuals released from the Massachusetts Treatment Center for Sexually Dangerous Persons, established "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses."[20] So the study did not examine the re-offense patterns of a representative sample of those who had sexual contact with minors, much less of all registrants. It instead focused on a small and atypical subgroup incarcerated in a special facility designed for those who present a particularly high re-offense risk. The paper itself cautions against assuming its findings apply to other offender populations.[21]

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[19] Robert A. Prentky, Austin F. S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & HUM. BEHAV. 635 (1997).

[20] *Id.* at 637-638.

[21] *Id.* at 636.

The Court's more recent opinion in *United States v. Kebodeaux*, 570 U.S. 387 (2013), cited several times by the Government as authority for registrants' high re-offense rates, (Pet. Br. 51, 54), is another example of the same problem. *Kebodeaux* does acknowledge studies that find registrants have low re-offense rates, but adds the paragraph the Government points to:

> There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime).

570 U.S. at 395-96.

Although the 5.3% re-offense figure taken from the Langan Study is of course many times lower than the "frightening and high" 80% rate erroneously relied on in *McKune* and *Smith*, it still overstates the average three-year re-arrest rate across *all* registrants, for a now familiar reason: the study only examined re-offending by adult, male, violent offenders released from state prisons.[22] This subgroup has a higher re-

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[22] DEPT. OF JUST., BUREAU OF JUST. STAT., PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDER RELEASED FROM PRISON IN 1994 1, 3, 7 (NOV. 2003) (hereinafter, "Langan Study") (noting that everyone in the study population was male, all men in the study were violent sex offenders, and only a "few" were under age 18).

offense risk than do registrants generally. One reason is that it oversamples repeat offenders, who are disproportionately sentenced to prison (rather than local jails, or probation)[23], and repeat offenders are more likely to re-offend after release than are first-time offenders. That is shown even within the study's own sample. The re-offense rate of first-time offenders released from prison in the Langan Study was about half the rate of those with a prior conviction for some offense (not necessarily a sex offense). Twenty-eight percent of the study population had at least *six* prior arrests, and their re-offense rate was well more than double that of first-time offenders in the study.[24] If one is considering the application of the rule at issue here

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[23] First offenders commit about 95% of sex crimes but were only 71.5% of those in the Langan Study. For proportion of crimes committed by first offenders, *see* Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL., PUB. POL'Y & L. 284 (2008) (finding that 95% of sex-offense arrestees in New York between 1986 and 2006 were first-time sex offenders.); MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA (April 2007), http://www.csom.org/pubs/mn%20residence%20restrictions_04-07sexoffenderreport-proximity%20mn.pdf (finding that first offenders constituted 97% of the 10,600 individuals convicted of sexual offenses in Minnesota between 1990 and 2002); For proportion of first offenders in Langan Study, *see* Langan Study at 26 tbl.27, 28 tbl.31 (showing that 29% of those in the study had a prior arrest for a sex crime, and 78.5% had prior arrests of any crime).

[24] The re-offense rate of first-time offenders in the study was 3.3%. Langan Study, *supra* n. 22, at 26 tbl.27. The average three-year re-offense rate among the 28% previously arrested at least 6 times (not necessarily for a sex crime) was about 7.25%. *See id.* at 27 (figure derived from table 29).

to individuals like Mr. Haymond, who are on supervised release for their first offense, the re-offense rates of those with an established history of re-offending is not helpful.

But there is a second important lesson from these examples. It is not only that one cannot use re-offense data from statistically distinct subgroups of registrants to make general statements about the entire group (or about other subgroups). The converse is also true: even average re-offense data properly computed across all registrants provides a needlessly inaccurate estimate of the likelihood of re-offense posed by an individual, because one could instead use re-offense data for the particular subgroup in which the individual falls. Average rates computed across all registrants is a crude measure, given their widely varying risk levels. The group's average re-offense rate is no more likely to fit a random registrant than would a pair of pants of the group's average waist and length.

The next section describes how risk varies across subgroups within the registrant population, and how that information is easily used to provide more accurate assessments of the likelihood that any particular person will re-offend.

IV. Widely Used and Inexpensive Actuarial Tests Can Sort Registrants by Risk Level, and Studies Show That Non-Offending Registrants at All Risk Levels Decline in Risk Over Time.

The Static-99R is a non-proprietary tool developed by researchers employed by the Canadian government and is the most widely used tool in the world to assess

the re-offense likelihood of individuals convicted of a sexual offense.[25] A ten-item actuarial scale[26] validated for adult males convicted of a contact sex offense, it is a relatively simple to administer. In California, for example, trained parole officers routinely administer it, and the state commissioned several studies that validated its predictive accuracy for adult males on the California registry.[27]

Re-offense risk is not static. It changes during the years following release from custody. Some re-offend, others do not. The single most well-established finding in criminology is that for every year they do not, the likelihood of a future re-offense declines.[28] Two widely-

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[25] *See* STATIC99, http://www.static99.org/ (last visited Jan. 22, 2019).

[26] The ten items cover demographics, sexual criminal history (e.g., prior sexual offense), and general criminal history (e.g., prior non-sexual violence). *See, e.g.*, Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE: J. RES. & TREATMENT 64, 65 (2012)). Such "structured" risk assessment tools are more accurate than clinical assessments. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 6–8 (2009).

[27] R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. Threat Assessment & Mgmt. 102, 104-05, 108 (2014).

[28] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); Megan C. Kurlychek, Shawn D.

cited studies, described below, show that the same is true for those convicted of sex offenses. They also show that this reduction in re-offense risk over time follows predictable trajectories that vary with the risk level as measured at the time of release.

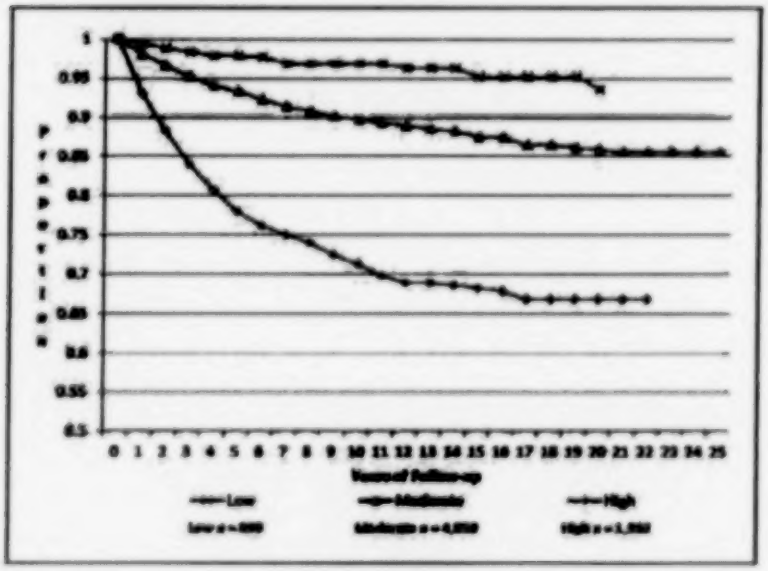

Figure One

Bushway, & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 75 (2012). Close to half (43%) of American men report being arrested by age 35, but the vast majority never re-offend. J.C. Barnes, Cody Jorgensen, Kevin M. Beaver, Brian B. Boutwell, & John P. Wright, *Arrest Prevalence in a National Sample of Adults*, 40 AMERICAN J. OF CRIMINAL JUSTICE 457 (2015); R. Karl Hanson, *Long-Term Recidivism Studies Show That Desistance Is the Norm*, 45 CRIMINAL JUSTICE AND BEHAVIOR 1340 (2018).

Figure One is taken from the first[29] of the two studies described here. Published in 2014, it combined data from 21 prior studies[30] that in the aggregate followed 7,740 adult male sex offenders after their release from custody. The Static-99R was used to classify offenders as High, Moderate, or Low risk for sexual re-offending at the time of release. Figure One shows the proportion in each of these three risk groups who were still sex-offense free at years 1 to 21 after release.[31]

The Static-99R's predictive power is shown by the separation of the three lines in the years after release. But just as important is how the proportion who are offense-free stabilizes over time. That is, for all three lines there is a point beyond which the line's downward slope becomes very small or ceases altogether. That means there are few, if any, new offenses after that point. Not surprisingly, that point comes sooner for those whose initial risk level was lower. But it

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[29] R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus & David Thornton, *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2794–95 (2014). This study examined re-offending by adult men only, because the Static-99R has not been validated for women, juveniles, or some non-contact offenders.

[30] In 10 of the 21 studies, re-offense was defined as a new conviction for a sex offense; in 11, re-offense was defined as the filing of new sex offense charges. *Id.* at 2797.

[31] Sixteen of the 21 studies drawn upon for this analysis followed offender populations in other Western countries (most often, Canada) in which released offenders are not subject to American-style offender registries or residency restrictions. Thus, these American rules could not explain why some do not re-offend.

eventually happens for all risk groups. Even registrants with the highest likelihood of re-offending as of the time of their release become low risk, after enough years at liberty without re-offending.

The second study, published in 2018,[32] directly compares the risk of a new sex offense by registrants with the risk that other felons with no history of sexual offending will commit a sexual offense after their release. This is an appropriate comparison if one is considering special rules for released registrants that are not imposed on other released felons. It is sometimes assumed special rules are appropriate whenever the re-offense risk is above zero, but if that were true then the special rules should apply to every group, an impractical, if not unconstitutional approach. That is because no group in the population, including those with no criminal history, presents a zero sex offense risk.

Any risk reduction program must take account of this fact. The wider the net it casts, the fewer the resources available to apply to each person caught in it, or to other programs that reduce risk. Too wide a net can therefore undermine the purpose animating special rules in the first place. Probably for this reason, states generally do not include nonsexual offenders in their sex offense registry, or subject them to other restrictions often imposed on registrants, such as

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[32] R. Karl Hanson, Elizabeth Letourneau, Andrew J.R. Harris, L. Maaike Helmus & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL'Y & L. 48, 50 (2018).

residency bans. So, this comparison to the rate of sexual offending by released felons with no prior sexual offense history is consistent with common legislative practice.

After reviewing available data on the rate of post-release sexual offending among those with a criminal conviction, but no conviction for a sexual offense, the researchers concluded that a registrant group with a post-release sexual offense arrest rate of two percent cannot be distinguished from released felons with no sexual offense history.[33] They labeled this 2% rate "desistance".

This second study used Static 99R scores to classify registrants into one of five risk levels as of the time of their release, ranging from "Very Low" through "Well Above Average". Risk levels for all five groups were then recalculated at six-month intervals in the years following release, to take account (when true) of the absence of any sexual reoffending up to that point. These "hazard rates" for each of the five risk categories are shown in Figure Two, reproduced from the 2018

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[33] *Id.*at 49 (discussing the findings of Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 ARCHIVES SEXUAL BEHAV. 861, 862 (2017)). Almost all the studies surveyed in ***Kahn, et al***, *id*, defined sexual offending after the nonsexual offender's release from prison as a conviction for a sexual offense rather than an arrest. Defining re-offense as a conviction generally yields lower rates than if re-offense is defined as an arrest, in part because available data often has gaps that fail to show whether a conviction followed an arrest. Any comparison of re-offense studies with different definitions of "re-offense" must take this difference into account. A lower rate for studies using conviction as the criterion is equivalent to some higher rate for studies using arrest as the criterion.

study, for the 24 years following release. The horizontal black line shows the 2% "desistance" rate against which each group's hazard rate for any given year can be compared.[34]

Figure Two again illustrates the predictive accuracy of the Static 99R. But more importantly, it shows more

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[34] When arrests for sexual offenses are discussed, the observation is usually made that a significant proportion of sex offenses are not reported. While surely true, that observation has little bearing on this analysis. There is no reason to think police are less likely to know about offenses committed by registrants than those committed by individuals without a sex-offense record. Indeed, if anything, the contrary seems more likely, assuming investigations start by examining individuals on the registry. If unreported offenses were taken in account, therefore, the relative rate of re-offense by registrants-their real rate as compared to the real rate of others-would likely be lower, because offenses they commit are less likely to go undetected than offenses committed by others.

Indeed, increased public attention to the problem of sex offenses seems to have reduced the proportion that go unreported to levels that now approach that for nonsexual crimes. Rachel Morgan and Jennifer Truman, *Criminal Victimization, 2017*, Dept. of Justice, Bureau of Justice Statistics (December 2018, NCJ 252472), https://www.bjs.gov/content/pub/pdf/cv17.pdf, at 7 tbl.6 (showing that the proportion of sexual assaults reported to the police increased significantly in 2017, to 90% of the reporting level for violent crime generally). This trend appears to have begun some years ago, as studies from 2011 show a reduction in the proportion of sexual offenses against child victims that go unreported. Finkelhor, Ormrod, Turner, & Hamby, *School, Police, and Medical Authority Involvement With Children Who Have Experienced Victimization*, 165 ARCHIVE OF PEDIATRIC AND ADOLESCENT MEDICINE 9 (2011)). Police are particularly likely to know about sex offenses committed against children by adults (as opposed to the large share that were committed by other children). *Id.*

clearly how the likelihood of re-offending declines, over time at liberty without a new offense, for every risk group. Even those in the very highest risk group ("well above average") fall below the 2% benchmark eventually, if they do not reoffend. Lifetime classification as a high risk, in other words, is not justified even for everyone initially classified at the highest risk level, because many also become low risk after enough years at liberty without having reoffended.

But in any event, this highest risk group is a very small proportion of all registrants. A recent California study found that only 33 of a random sample of 371 adult male registrants (8.8%) were in this risk category.[35] Another 74 (20%) were above average in risk.[36] More than 70% of registrants were in the three lower risk categories. Note that Figure Two shows that the lowest risk group is at the 2% rate *at the time of their release*.

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[35] Seung Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update* at 19, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf (last visited Jan. 22, 2018).

[36] *Id.*

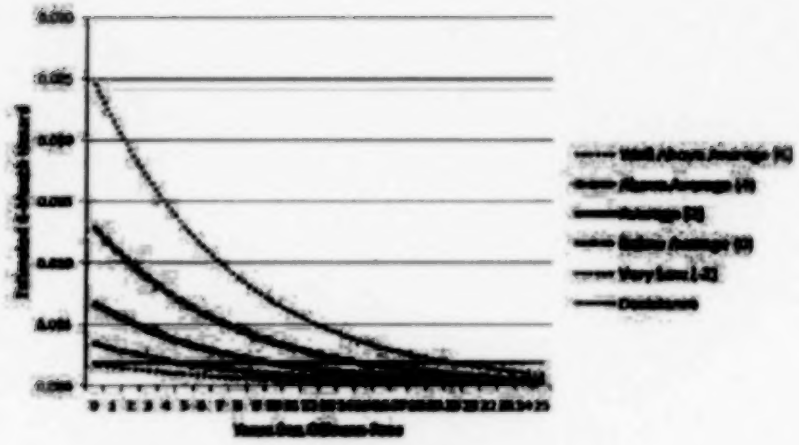

Figure Two

The clear lesson from this data is that general statements about the risk posed by "sex offenders"- or registrants-are not useful. The likelihood of re-offending varies across individuals, and also over time for any particular individual. And these likelihoods can be assessed by a simple actuarial test already in wide use. A legal rule cannot be justified by a high risk of re-offending for ""sex offenders" as a group, because far too many in the group present a low risk, either at release or later. A claim that high re-offense risk justifies a compromise of constitutional rights must surely rest, if accepted at all, on a valid assessment of the risk posed by the individual whose rights one proposes to limit.

This point is especially relevant in this case. As we explain in the next section, the majority of federal offenders potentially affected by § 3583(k) have, like Mr. Haymond, only a single criminal conviction for a

non-production CP offense. They are therefore among those with the lowest re-offense risk.

V. Those Whose Only Criminal Conviction is for Possession of Child Pornography Are A Distinct Group Among Sexual Offenders, And Pose a Particularly Low Re-Offense Risk.

During Fiscal Year 2016, federal courts sentenced a total of 2,580 individuals for sexual offenses of all kinds.[37] Fifty-four percent of these—1,403—were sentenced under § 2G2.2, the guideline covering possession and the related non-production offenses indistinguishable from it.[38] As a practical matter, then, possession is the offense to which § 3583(k) has the greatest potential application. And as authorized by that section's first sentence, a life term of supervised release is imposed on about one-third of these offenders.[39]

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[37] These and subsequent totals were calculated using Table 17 in the United States Sentencing Commission's 2016 Interactive Sourcebook of Federal Sentencing Statistics, https://www.ussc.gov/research/sourcebook-2016 (last visited Jan. 22, 2018). Sexual offenses other than non-production child pornography are the sum of all those sentenced under guidelines § 2A3.1,§ 2A3.2, § 2A3.3, § 2A3.4, § 2G1.1, § 2G1.2,§ 2G1.3, § 2G2.1, § 2G2.3, § 2G2.4, § 2G2.5, § 2G2.6, § 2G3.1, and § 2G3.2.

[38] Receipt and distribution of child pornography are included in this tabulation, as 97% of all non-production offenders necessarily committed those offenses as well, even though half were prosecuted only for possession. See n. 5, *supra*.

[39] See n. 7, *supra*.

Those convicted of possession (but no other sexual offense) are demographically distinct from other registrants. A study by researchers at the Federal Bureau of Prisons compared them to federal offenders convicted of a contact offense but no possession offense. They found that possession offenders were on average older, less likely to have been unemployed, less likely to have any history of substance abuse, and less likely to have a prior criminal offense of any kind. Studies of non-federal offenders echo these findings,[40] and also show that possession offenders are on average more highly educated[41].

There are also clear differences in the psychological traits of known contact-offenders, as compared to possession offenders. Committing violent acts typically requires psychological traits that are not needed to look at depictions of them. One study found, for example, that more than ten percent of a sample of male college

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[40] *E.g.* Babchishin, K. M., Hanson, R. K., & Hermann, C. A., *The Characteristics of Online Sex Offenders: A Meta-Analysis*, 23 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 92 (2011) (older, white, fewer prior crimes); Blanchard, R., Kolla, N. J., Cantor, J. M., Klassen, P. E., Dickey, R., Kuban, M. E., & Blak, T., *IQ, Handedness, and Pedophilia In Adult Male Patients Stratified By Referral Source*, 19 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 285 (2007); Elliott, I. A., Beech, A. R., Mandeville-Norden, R., & Hayes, E., *Psychological Profiles of Internet Sexual Offenders: Comparisons With Contact Sexual Offenders*, 21 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 76 (2009) (older).

[41] Blanchard, R., Kolla, N. J., Cantor, J. M., Klassen, P. E., Dickey, R., Kuban, M. E., & Blak, T., *IQ, Handedness, and Pedophilia In Adult Male Patients Stratified By Referral Source*, 19 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 285 (2007).

undergraduates had sexual fantasies involving children, but that "pornography use was associated with deviant sexual behavior scores only for individuals scoring high in psychopathy."[42] People who never commit a crime may nonetheless fantasize about causing someone harm. Millions of Americans routinely enjoy movies that depict interpersonal violence but never commit violent acts themselves.

A capacity for victim empathy creates a psychological barrier against committing violent acts that harm others. Those who in fact commit such acts are more likely to lack that capacity. They are also more likely to have an antisocial personality.[43] Studies find that just these differences distinguish possession offenders from those who commit contact offenses against children.[44] Other studies show that as

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[42] Kevin M. Williams, et al., *Inferring Sexually Deviant Behavior from Corresponding Fantasies: The Role of Personality and Pornography Consumption*, 36 CRIM. JUST. & BEHAVIOR 198, 212 (2009). ("The cardinal features of psychopathy include a deceptive and manipulative interpersonal style, shallow affect (e.g., lack of guilt and empathy), and an impulsive, irresponsible, and antisocial lifestyle." *Id.* at p. 206.)

[43] Antisociality refers to a set of personality traits and attitudes indicating disregard for societal norms and the safety of others, a lack of remorse, impulsivity, and persistent rule breaking. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed. 2013).

[44] Babchishin, et al., *Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of Online and Offeine Sex Offenders Against Children* 44 ARCHIVES OF SEXUAL BEHAVIOR 45, 51 (2015).

compared to possession offenders, contact offenders demonstrate lower capacity for self-control in general.[45]

These demographic and psychological differences help explain why individuals with a single possession conviction (like Mr. Haymond) have low rates of re-offending and are particularly unlikely to commit a contact offense after release. A study by the United States Sentencing Commission looked at the post-release conduct of every one of the 610 individuals released from federal custody in 1999 and 2000 who (1) was convicted of possession, receipt, or distribution of child pornography and (2) had no convictions for any other sex offense (although 92 had prior non-sexual offenses).[46] The study followed these individuals for an average of 8.5 years after their release from custody. All but 22 of the 610 (96.4%) remained free of a contact sex offense of any kind.[47] Fourteen looked at pictures again.[48] The overwhelming majority did neither.

A study by a team that included both the leading scholar of internet sexual offending, and the primary developer of the Static 99R, found that just 25 of 1,247 online child pornography offenders committed a contact sexual offense after release. They concluded that "online offenders rarely go on to commit detected

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[45] Elliott, et al., *The Psychological Profiles of Internet, Contact, and Mixed Internet / Contact Sex Offenders* 25 SEXUAL ABUSE: J. OF RES. & TREATMENT 3, 10 (2012).

[46] Sentencing Commission Report, supra n. 5, at 295-96.

[47] *Id.* at 300.

[48] *Id.*

contact sexual offenses."[49] These results are repeated in study after study in American, as well as in foreign, populations.[50] A 2014 study of federal possession offenders by researchers at the Federal Bureau of Prisons concluded that efforts to reduce their re-offense rates with therapy may not be cost-effective, because the "overall re-offense base rate of CP offenders" was so low it was difficult to reduce it further.[51] A leading authority on internet sexual offending, who has an ongoing research program to devise a tool to predict reoffending in this group, explained in submissions to the U.S. Sentencing Commission that first-time possession offenders with no other criminal conviction have a particularly low risk of sexual recidivism.[52]

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[49] Michael C. Seto, R. Karl Hanson, and Kelly M. Babchishin, *Contact Sexual Offending by Men With Online Sexual Offenses*, 23 Sexual Abuse: A Journal of Research and Treatment 124, 136 (2011).

[50] Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeursfrom Pederasts* 61 HASTINGS L.J. 1281, 1294-97 (2010) (collecting additional studies); *see also* Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY, July 14, 2009, http://www.biomedcentral.com/content/pdf/1471-244X-9-43.pdf (Study of Swiss offenders concludes that "the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses.").

[51] Faust, et al., *Child Pornography Possessors and Child Contact Sex Offenders: A Multilevel Comparison of Demographic Characteristics and Rates of Recidivism* 27 SEXUAL ABUSE: J. RES. & TREATMENT 1, 15 (2014).

[52] Michael Seto, *Child Pornography Offender Characteristics and Risk to Reoffend* (Feb. 6, 2012) (Submission prepared in connection

The Government's claim that a heightened propensity to re-offend justifies the provisions at issue here is problematic as a general matter, for all the reasons set forth in prior sections. But it is particularly troublesome with respect to possession offenders, who constitute a majority of those affected by this claim.

CONCLUSION

The Government urges the Court to reverse the Tenth Circuit, relying in part on prior statements by this Court concerning the propensity of "sex offenders" to repeat their crimes as justification for that result. But these statements were made without the benefit of any serious examination of the scientific evidence bearing on their accuracy. Such an examination would create serious doubts about their accuracy, as it did for the Sixth Circuit in *Does #1-5 v. Snyder*. 834 F.3d 696 (6th Cir. 2016).

The Court should resist the Government's urging that it repeat the mistake in this case. To the contrary, the Court should use the opportunity this case presents to make clear that its earlier statements cannot be taken as resolving this factual claim, and that indeed, there is serious reason to doubt the factual accuracy of the Court's earlier statements. They therefore cannot serve as the basis for upholding the constitutionality of the supervised release sentencing provisions here at issue.

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with testimony before the United States Sentencing Commission), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Seto.pdf.

Respectfully submitted,

Daniel E. Gustafson
Counsel of Record
Karla M. Gluek
Eric S. Taubel
Gustafson Gluek PLLC
120 South Sixth Street
Suite 2600
Minneapolis, MN 55402
(612) 333-8844
dgustafson@gustafsongluek.com

Counsel for Amici Curiae

APPENDIX

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

Amanda Agan is Assistant Professor of Economics and an Affiliated Professor in the Program in Criminal Justice at Rutgers University. She received her Ph.D. in Economics from the University of Chicago. Her research focuses on the economics of crime, and her studies spotlight the unintended consequences of policies such as sex offender registration and ban-the-box laws. Her studies on the consequences of sex offender registration include papers in the *Journal of Law and Economics* and the *Journal of Empirical Legal Studies*.

Catherine L. Carpenter is The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. She teaches and writes in the area of criminal law. Her primary scholarly focus is about the injustice and unconstitutionality of sex offender registration laws. Her work has been cited by courts, including the Maryland Court of Appeals in *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123 (Md. 2013), which overturned Maryland's sex offender registration laws on *ex post facto* grounds.

Ira Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He was Chief Reporter for the American Law Institute's major project, *Principles of the Law of Family Dissolution*.

His empirical studies with social psychologists have focused on family policy. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

R. Karl Hanson, Ph.D., C.Psych., is one of the leading researchers in the field of risk assessment and treatment for individuals with a history of sexual offending. He has published more than 175 articles, including several highly influential reviews, and has contributed to the development of the most widely used risk assessment tools for individuals with a history of sexual offending (Static-99R; Static-2002R; STABLE-2007). Based in Ottawa, Canada, he worked for Public Safety Canada between 1991 and 2017, a federal department, and retired as Manager of Corrections Research. He is now adjunct faculty in the psychology departments of Carleton University (Ottawa) and Ryerson University (Toronto).

Eric Janus is a professor of law at Mitchell Hamline School of Law, former President and Dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Chair Professor of Law and Psychology and Dean's Circle Scholar at the University of San Francisco School of Law. He is an expert on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and the wrongful conviction

of the innocent. Dr. Leo has won numerous individual and career achievement awards for research excellence and distinction, and in 2016, the *Wall Street Journal* named him as one of the twenty-five law professors most cited by appellate courts in the United States.

Chrysanthi Leon, J.D., Ph.D., is Associate Professor of Sociology and Criminal Justice at the University of Delaware. She received her J.D. and Ph.D. from the University of California, Berkeley. She is the author of *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America*, and co-editor of *Challenging Perspectives on Street-Based Sex Work*.

Jill S. Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami Shores, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), and co-editor (with J.J. Prescott) of *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge Univ. Press, under contract).

Robert D. Lytle is an Assistant Professor in the Department of Criminal Justice at the University of Arkansas at Little Rock. He has published research on public opinion, desistance patterns, and policy relating to sex offending, including a dissertation and several papers on sex offender registration and notification laws. His current work is focusing on policy implementation and effectiveness for criminal justice policy, including sex offense laws generally and sex offender registration and notification specifically.

Michael H. Miner, Ph.D., L.P., is Professor of Family Medicine and Community Health and Research Director for the Program in Human Sexuality at the University of Minnesota Medical School. He is Coordinator of Psychological and Forensic Assessment for the Program in Human Sexuality. His research focuses on sex offender treatment, sexual abuse perpetration by adolescent males, risk assessment, and psychological and cognitive mechanisms underlying hypersexuality and sexual risk behavior. He is the immediate Past President of the Association for the Treatment of Sexual Abusers and Past Vice President of the International Association for the Treatment of Sexual Offenders.

John Monahan is the Shannon Distinguished Professor of Law and Professor of Psychology and Psychiatry at the University of Virginia. He is a member of the National Academy of Medicine and of the American Academy of Arts and Sciences. Monahan is the founding president of the American Psychological Association's Division of Psychology and Law. He is the author or editor of 17 books and more than 300 articles and chapters. Monahan's work has been cited

frequently by courts, including the California Supreme Court in the landmark case of *Tarasoff v. Regents*, and the United States Supreme Court in *Barefoot v. Estelle*, in which he was referred to as "the leading thinker on the issue" of violence risk assessment.

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is co-director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) in holding that portions of Michigan's sex offender registration law violated the *Ex Post Facto* clause.

Lisa L. Sample is the Reynolds Professor of Public Affairs and Community Service in the School of Criminology and Criminal Justice at the University of Nebraska Omaha. She has been publishing research on public opinion, reoffending, and sex offender laws since 2001. Her current research focus is the longitudinal effects of sex offender laws on registrants, their partners/spouses, and their children, which is the subject of her forthcoming co-authored book, *Living Under Sex Offense Laws: Consequences for Offenders and their Families*.

Michael Seto, Ph.D., is the forensic research director of the Royal Ottawa Health Care Group. A clinical and forensic psychologist, he has presented and published extensively on the topics of pedophilia, sexual offending, online offending, and risk

assessment. He is internationally recognized for this work and has authored two well-reviewed books on these topics published by the American Psychological Association, including his 2013 volume, Internet Sex Offenders.

Kelly Socia, Ph.D., is an Associate Professor in the School of Criminology and Justice Studies at the University of Massachusetts Lowell. His research has focused on individuals listed on sex offense registries, residency restrictions, re-entry and recidivism, among other topics. In a recent Florida case he provided expert testimony and geomapping that resulted in a ruling against *ex post facto* application of local residency restrictions.

Richard Wollert, Ph.D., is a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. An expert witness in many cases involving sexually violent predators, his publications critique sex offender recidivism risk assessments, DSM paraphilia diagnoses, and federal sentencing guidelines for child pornography. Dr. Wollert and his associates have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

Franklin Zimring is the William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies, at the University of California, Berkeley. He is known worldwide for his empirical work on criminal justice policy. Among his many books are *Criminal Law and the Regulation of Vice* and *An American Travesty: Legal Responses to Adolescent Sexual Offending*.